Supreme Court, U.S.
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No. 97-1977

In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATION, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC., and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT SELF INSURERS' MANAGEMENT GROUP'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners are 14 of several hundred members of Self Insurer's Management Group (SIMG). SIMG was formed as a group self-insurance association. The reason for its formation bottoms on the Workers' Compensation Act of Oklahoma. It requires that every Oklahoma employer maintain workers' compensation coverage for its employees unless coming within a specific statutory exception, all per authority of Title 85 O.S. §11. An employer may provide workers' compensation coverage in one of three ways: (1) by purchasing a workers' compensation policy from an insurance company; (2) by self insuring and individually assuming liability for claims filed by its own employees; or (3) by self insuring and pooling liabilities with other self insurers through a group self insurance association per authority of Title 85 O.S. §61. Petitioners elected to join the several hundred other members and proceeded under option "(3)", supra. Petitioners joined the association, accepted its benefits but did not pay their insurance premiums.[1] Therefore, the association (SIMG) brought suit against those members (Petitioners herein) for failing to pay. The trial court ruled on Petitioners' Summary Judgment motion that the Agreement was unenforceable because the contracts were " . . . unregistered securities and therefore cannot be enforced . . . ". See said Final Journal Entry at Petitioners' Brief, App. 27. An appeal to the Oklahoma Supreme

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[1] See App. 1 which is the standard SIMG Agreement with its members. Paragraph 1 states in part "[t]he Association . . . shall collect all premiums and assessments owed by each and every member . . . "

Court resulted in a reversal. Petitioners seek this Writ because of the adverse Oklahoma Supreme Court Decision. See said Decision at Petitioners Brief, App. 1.

PERCEIVED MISSTATEMENTS OF FACTS AND LAW

As required by Rules of the Supreme Court, Rule 15, SIMG perceives Petitioners have made misstatements in their Joint Petition. Their first reason for granting the Writ as stated on page 7 of their Brief is:

> The Oklahoma Supreme Court has denied the Petitioners protection of federal securities laws on the *sole basis* that the McCarran-Ferguson Act "preempts" and displaces the provision of federal securities laws regarding the issuance of ownership interests in an insurance company/association. [Emphasis added.]

This is an erroneous statement characterizing the Oklahoma decision. The Oklahoma Supreme Court ruled against Petitioners on more than *one* basis. After its discussion of federal security laws not applying because of the McCarran-Ferguson Act, the Court's decision (Petitioners' Brief, App. 21) clearly states:

> *There is another and equally important reason* why state law must prevail here. In this appeal, Colbert and Oklahoma Employers Safety Group's other members are *not primarily investors.* Instead, they are employers with statutory responsibility to secure payment of workers' compensation benefits to their injured employees. To the extent, if any, that group members could be said to be investors, their rights as investors must be held to be secondary

> to their responsibilities as employers. When it passed §149.1.C the Legislature established a policy that such employers have no rights under state securities law. The legislation called for a comprehensive scheme of regulation, which has been implemented by the Workers' Compensation Court. Under these circumstances the McCarran-Ferguson Act mandates that federal securities laws do not apply. [Emphasis added.]

Simply stated, Petitioners are employers buying business insurance – not purchasers of securities.

REASONS FOR DENYING THE WRIT

1.a. AN AGREEMENT TO POOL WORKERS' COMPENSATION LIABILITIES THROUGH A SELF-INSURANCE ASSOCIATION IS NOT A SECURITY WITHIN SECURITIES ACT OF 1933 (Title 15 U.S.C. §77(A), et seq.).

To prevail, Petitioners must prove the Securities Act of 1933 regulates the subject insurance contracts of SIMG. Their Joint Petition is conspicuously absent of addressing the federal exception granted to insurance. That exception is found in Title 15 U.S.C. §77c(a)(8) which states the Securities Act of 1933 shall not apply to:

> Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like function, of any State or Territory of the United States of the District of Columbia.

Even without this specific exemption, it was the intention of the 1933 Act to exclude insurance policies because the legislative committee report issued at the time of passing the act stated that:

> "[T]he insurance policy *and like contracts* are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the [1933] [A]ct would lead, even without [the 3(a)(8)] exemption, to the exclusion of insurance policies from the provisions of the Act, but the specific exemption is included to make misinterpretation impossible." H.R. Rep. No. 85, 73d Cong., 1st Sess., (1933) 15. [Emphasis added.]

Therefore, the 1933 Act itself defeats the Joint Petition.

1.b. THE MCCARRAN-FERGUSON ACT IS NOT VOIDED BY THE SUPREMACY CLAUSE.

The McCarran-Ferguson Act, 15 U.S.C. §1012[2], remains consistent with the theme of the 15 U.S.C.

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[2] McCarran-Ferguson Act, 15 U.S.C. §1012

(a) **State regulation.** The *business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which related to the regulation or taxation of such business. [Emphasis added.]

(b) **Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the *business of insurance* or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§1 et seq.], and

§77c(a)(8) insurance exception of the Securities Act of 1933. Its brief content of two subsections compels state regulation and prohibits federal regulation. The single reported decision dealing with workers' compensation insurance and its treatment by the McCarran-Ferguson Act is *Re Workers' Compensation Ins. Antitrust Litigation*, 867 F.2d 1552 (8th Cir. 1989, Minn.). The court enforced the McCarran-Ferguson Act and exempted the insurers from the federal regulation of the Sherman Act. In that case, the employers were again attempting to avoid paying lawful premium rates. The Court stated at page 1556 that "[w]e are satisfied that the district court was correct in finding that the alleged private rate setting by the defendant companies fell within the McCarran-Ferguson Act 2(a) provision relating to the business of insurance".

Petitioners attempt to avoid the "business of insurance" terminology by citing: 1) *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982); 2) *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); 3) *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); 4) *Securities and Exchange Commission v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996); 5) *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979); and 6) *Federal Trade Commission v. Dixie Finance Company, Inc.*, 695 F.2d 926

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the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§41 et seq.], shall be applicable to the *business of insurance* to the extent that such business is not regulated by State law. [Emphasis added.]

(5th Cir. 1983), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983).

None apply here for the following reasons:

Union Labor case, supra: The issue is whether an insurance company's use of a Peer Review Committee as an aid to determine if claims are covered by its policies is exempt from anti-trust law under McCarran-Ferguson Act. This Court stated at page 132 that the use of a Peer Review Committee " . . . is a matter of indifference to the policy holder, whose only concern is *whether* his claim is paid, not *why* it is paid". The Court distinguished activities which exempt the "business of insurance" from the "business of insurance companies" at page 132. In the instant case, the contract of insurance is the controversy, see App. 1, not the method of how SIMG determines to pay claims. [Emphasis supplied.]

Pilot Life case, supra: This case deals with whether the general law of bad faith in Mississippi is sufficient to constitute state regulation, such state regulation being necessary to permit the McCarran-Ferguson Act to apply. The court stated at Page 50 " . . . that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry". There is no question or issue in the instant case that Oklahoma law (85 O.S. (1991) §149.1 and *Rule 3*) supplies regulation of SIMG and like insurance companies. Therefore the *Pilot Life* case has no application here.

Hartford Fire case, supra: This case ruled consistent with SIMG's position in the instant case. The Court in *Hartford* ruled that a domestic insurance carrier did not

lose its immunity from federal regulation by acting in concert with a foreign insurer that may not be regulated by state law. Petitioners' reliance on this case appears to be misplaced.

Securities and Exchange case, supra: This District of Columbia Circuit Court of Appeals case held that a viatical settlement is an investment contract and not an insurance contract.[3] The purchaser of the viatical settlement is not the insured. The Petitioners in the instant case *are* the insured, therefore giving rise to the "business of insurance" requirement of the McCarran-Ferguson Act. Purchasing an interest is an already existing life policy on a dying person is not the "business of insurance", but rather the "business of investing". Therefore no exemption from federal regulation exists.

Group Life case, supra: This case dealt with pharmacies selling drugs to insurer's policy holders at a small price in return for the insurer agreeing to reimburse the pharmacies for certain costs. The court held at page 212 that "[t]he significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this court in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 3 L.Ed.2d 640, 79 S.Ct. 618 (1959)". In other words, the activity leading to federal regulation was not providing insurance, but arranging the purchase

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[3] A viatical settlement is an investment contract when an investor buys an interest in an existing life insurance policy of a terminally ill person – typically an AIDS victim at a large discount. When the insured dies, the investor gets the insurance benefit. *Securities and Exchange,* supra, 87 F.3d 536 at 537.

of prescriptions. As the court stated at page 216, "[t]he Pharmacy Agreements are not between insurer and insured. They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services *other than insurance*. [Emphasis added.] This case is certainly distinguishable from the instant case because SIMG's Agreement, App. 1, is for providing insurance, not some other commodity such as drugs.

F.T.C. case, supra: Here, the F.T.C. was investigating finance companies and automobile dealerships – not insurance companies. The investigation centered around whether those type businesses were requiring credit life insurance to be purchased as a precondition to the extension of credit. The court at page 930 allowed federal regulation because:

> Were the Commission attempting to investigate the *sale* of these policies, clearly the state statutes, such as Louisiana's R.S. 22:1212, would govern and the McCarran Act exemption would apply. But the Commission is not investigating any misrepresentations made in connection with the terms of any policy to be issued; rather, it is concerned with the extension of credit. While the offering of such policies in such a setting may facilitate the sale of insurance policies, that alone does not elevate the activity to the "business of insurance." *Perry v. Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979). [Emphasis supplied.]

The nature of finance companies and automobile agencies cannot pass the test of being the "business of

insurance" as can SIMG which has as its sole objective to furnish workers' compensation insurance.

None of the aforementioned cases relied upon by Petitioners can circumvent the McCarran-Ferguson Act applying to SIMG. SIMG is a state regulated insurance association organized for the sole purpose of furnishing workers' compensation insurance to employers.

Subproposition I(C) of Petitioners Joint Petition, page 13, cites *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 at 501, 113 S.Ct. 2202 at 2208, 124 L.Ed.2d 449 (1993). The purpose of citing this case seems to be to assert that the McCarran-Ferguson Act does not apply to SIMG. The reasoning used by Petitioners is unclear to Respondent. The *U.S. Department of Treasury* court reasoning, however, seems very clear. This case involves facts of liquidating an insolvent insurance company. Federal Department of Treasury was a creditor as well as a state court appointed liquidator. The liquidator invoked the McCarran-Ferguson Act to preclude federal priority of claims and allow use of state priority of claims. Again, the court honored the McCarran-Ferguson Act by upholding the state law when it stated that:

> We hold that the Ohio priority statute, to the extent that it regulates policyholders, is a law enacted for the purpose of regulating the business of insurance. To the extent that it is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance. *U.S. Department of Treasury*, Id. at 454.

In other words, the McCarran-Ferguson Act exemption applies to matters directly related to the business of

insurance, but not to incidental matters such as interests of non-policyholder creditors.

The Oklahoma Supreme Court decision challenged by Petitioners in the instant case is consistent with the holding in the *U.S. Department of Treasury* case. SIMG's collection of its premiums from policyholder Petitioners is clearly related to the "business of insurance".

THE OKLAHOMA LEGISLATIVE AMENDMENT IN 1996 DOES NOT AFFECT VALIDITY OF THE SUBJECT CONTRACT

Petitioners' Proposition II assumes the subject Agreement of insurance, App. 1, is a security. Based on that assumption only, the Agreement would be subject to the Oklahoma securities laws when the Agreement was executed. Therefore, the Agreement would necessarily be invalid because of being an unregistered security. That assumption of being a security is false for the reasons stated in this Brief's Proposition 1(a) and 1(b), supra.

Petitioners' misplaced reliance on the aforementioned false assumption leads them to a discussion of retroactive application of Title 85 O.S. 1996 §149.1.C. The original statute, Title 85 O.S. 1991 §149.1[4] is identical to

[4] 149.1. Rules for certain employers to pool liabilities.

A. The Workers' Compensation Court shall adopt rules permitting two or more employers not otherwise subject to the provisions of Section 2b of this title to pool together liabilities under this act for the purpose of qualifying as a group self-

the amended version except for the addition of subsection "C". The original version is silent as to whether the insurance policy is to be considered a security. Because of the clear status of the insurance contract being an insurance contract, there should be no question that the Oklahoma Securities Act[5] does not apply. Title 71 O.S. §2(t) defines "Security" as:

> (t) "Security" *does not* include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period. [Emphasis added.]

It is widely recognized that insurance contracts are not subject to securities laws. Even if it was assumed *arguendo*, that the Agreement constitutes a security, it is

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insurer and each such employer shall be classified as a self-insurer.

B. The Court shall approve the distribution of all undistributed policyholders' surplus of a Workers' Compensation Self-Insurance Program if the Program complies with the following criteria:

1. Has been in business for at least five (5) years;

2. Has its financial statements audited by a public accounting firm which audits at least one corporate client which has assets in excess of One Billion Dollars ($1,000,000,000.00) and on which the accounting firm has issued an unqualified opinion as to the fair presentation of the financial position of the Program showing adequate solvency and reserves; and

3. Is in compliance with the provisions of this title and all other regulations as required by the Court.

[5] Oklahoma Securities Act (Title 71, Oklahoma Statutes §1 et seq.)

exempt from registration under the Oklahoma Securities Act. Further, Title 71 O.S. §401(a)(5) exempts from "[a]ny security issued by any cooperative, nonprofit, membership corporation or association organized in compliance with the laws of this state." SIMG was a risk-sharing arrangement organized in compliance with the Workers' Compensation Act regulated thereunder and regulations further deemed it not for profit, but for the benefit of its members.

Because the Agreement is not a security and not affected by security laws, the Oklahoma legislature amending §149.1 should not raise the issue of retroactivity. To add words reiterating that group self insurers are not subject to regulation is at most clarification. As stated by the Oklahoma Supreme Court in its decision giving rise to this Petition For Writ:

> ¶13 Defendants/Appellees also contend that they have a vested right in the trial court's determination that the Agreements were void as being contrary to the Oklahoma Securities law, so that §149.1.C should not be applied retroactively, despite its clear language. We disagree. Defendants/Appellees rely on *Texas County Water Irr. and Water Resources Ass'n v. Oklahoma Water Resources Bd.*, 803 P.2d 1119 (Okla. 1990). That case, does not support Defendants/Appellees position. *There we held that where a prior enactment is ambiguous there is a presumption that subsequent legislation amending the act "was designed to clarify its text."* This is the situation before us here. Defendants/Appellees do not

> suggest what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so. [Emphasis added.] See said decision at Petitioners' Brief, App. 8.

Furthermore, the Oklahoma Supreme Court found that "Defendant/Appellees *do not suggest* what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so", supra. [Emphasis added.] See said decision at Petitioners' Brief, App. 8. This highlights the Petitioners' failure to raise at trial court and properly preserve on appeal the issue of "vested interest". This failure to raise the issue precludes jurisdiction by the U.S. Supreme Court under its Rule 14(g)(i).

CONCLUSION

Workers in Oklahoma should be entitled to have insurance covering job related injury. Employers should be entitled to choose to self insure and pool their liabilities with other self insurers through a group self insurance association regulated by the Workers Compensation Act.

Petitioners have made that choice. They also, however, made the further unfortunate choice of not paying their insurance premiums.

They attempt to nullify the McCarran-Ferguson Act by urging that a clearly defined insurance agreement is something else, by urging to disallow a state's right to permit establishment of self-insurance associations, and further disallow injured workers to be insured by

employer self insurance groups, all which fall short of the requirements necessary to grant a Writ of Certiorari.

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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SELF INSURORS' MANAGEMENT GROUP

APPLICATION FOR MEMBERSHIP

INDEMNITY AGREEMENT
AND POWER OF ATTORNEY

This Application and Agreement is made by and between each and every Member of the SELF INSURORS' MANAGEMENT GROUP, and by said ASSOCIATION itself, and is based upon the following understandings by the parties:

WHEREAS, the Members have organized and formed an ASSOCIATION which shall be known as SELF INSURORS' MANAGEMENT GROUP, herein referred to as the "Association," and

WHEREAS, the ASSOCIATION, on Behalf of its Members, will submit to the Workers' Compensation Court, an application to permit the Members to enter into an agreement to pool their respective liabilities under the Oklahoma Workers' Compensation Act, herein referred to as the "ACT," and

WHEREAS, the Rules of the Workers' Compensation Court require that each and every member of a group self-insurance association shall execute an indemnity agreement and power of attorney, and

WHEREAS, each Member of the ASSOCIATION has elected to become a party to this Agreement, to comply with conditions set forth herein and to establish a group self-insurance association pursuant to the provisions of the Workers' Compensation Act and the Rules of the Court, and to execute such instruments and take such

action as may be required to form and continue such ASSOCIATION.

NOW, THEREFORE, and for in consideration of the mutual covenants, promises and obligations contained in this AGREEMENT, which are given by the ASSOCIATION and by each and every Member to each other Member and are so accepted by each every Member and the ASSOCIATION, the parties hereto covenant and agree as follows:

1. The ASSOCIATION, through its BOARD OF DIRECTORS, herein referred to as "BOARD," shall collect all premiums and assessments owed by each and every Member when same is due or the ASSOCIATION shall promptly terminate the membership of any delinquent Member as provided by Court Rules and shall take all reasonable and necessary actions to collect such delinquent accounts from any terminated Member.

2. The ASSOCIATION shall acquire both specific and aggregate excess insurance in amounts required by the Court for the protection of its Members against catastrophic loss.

3. Each and every Members [sic] jointly and severally agrees to assume, pay and discharge any liability under the ACT of any and all members of the ASSOCIATION, and each Member agrees to pay any assessments as may be required by the BOARD.

4. Each and every member authorizes the BOARD to designate and appoint Chris Sturm as the Administrator who shall be empowered to accept service on behalf of the ASSOCIATION and its Members and shall have the

power of attorney of each and every Member in all transactions relating to or arising out of the operation of the ASSOCIATION. The BOARD, in its discretion, may at any time revoke the aforesaid powers of the Administrator and substitute another in his place.

5. Regardless of whether the Member terminates its membership in the ASSOCIATION voluntarily or whether such membership is either terminated by the ASSOCIATION or the Court, the above agreement to indemnify each and every other Member and the power of attorney shall continue in force and effect and shall remain completely unabated concerning any and all liabilities and obligations that the ASSOCIATION or its Members may incur under the ACT during any fiscal year in which the Member participates in the ASSOCIATION.

6. The Members intend this Agreement as a mutual covenant of assumption and not as a partnership, but if any court of competent jurisdiction shall construe it to be a partnership, then it is the intent of the parties that such partnership be limited in scope to the uses for which this Agreement is executed and for no other.

7. The ASSOCIATION and each and every Member agree with each other Member, including any future Members, to be bound by all of the terms and conditions of this Agreement, by the rules and regulations that may be adopted and approved by the BOARD and by the By-Laws of this ASSOCIATION.

8. The Members joint and severally covenant and agree that there shall be no disbursements out of funds of the ASSOCIATION by way of dividends or distribution of

claim reserves until after the provision has been made for all obligations of the ASSOCIATION under the ACT and except at the discretion of the BOARD upon application to and approval by the Court.

9. Any Member may terminate its membership in this ASSOCIATION by giving thirty (30) days written notice by certified mail return-receipt requested to the ASSOCIATION and to the Court. Termination of a Member's membership by the ASSOCIATION or by withdrawal of approval by the Court shall likewise be upon thirty (30) days written notice by certified mail return-receipt requested to the Member and to the Court.

10. The Members ratify and confirm the appointment by the BOARD of Claims Management Services as the Service Company for the ASSOCIATION and its Members, whereby Claims Management Services shall provide services under the ACT on behalf of its Members.

Member: Century Martial Arts Supply, Inc. By: /s/ L. Michael Olland

Date: 3-1-86 Title: C.E.O.

(Filed Apr. 31, 1986) Witness: /s/ Sumie Drunl

Title: Mgr. of Human Resources

Received and Accepted by the Board of Supervisors and Administrator of SELF INSURORS' MANAGEMENT GROUP.

President: /s/ Joe Rogers
Joe Rogers

Administrator:
/s/ Chris Sturm
Chris Sturm

Date: 3-1-86

Approved this 4th day of April, 1986 Workers' Compensation Court, State of Oklahoma

/s/ Michael Clingman
Michael Clingman

I do hereby certify that the above and foregoing is a true copy of the original Order now on file in this Office and that a certified copy hereof was by me mailed to the parties affected on the 3rd day of APR 1986

Witness my hand and the Official Seal of this Court on this date.

/s/ Robert L. Tharp